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IN THE

Supreme Court of the United States

October Term, 1969

No. 493

ALBERT SNYDER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Albert Snyder, prays that a writ of certiorari issue to review the denial of a petition for rehearing and the judgment of the United States Court of Appeals for the Ninth Circuit affirming the United States District Court for the Central District of California convicting petitioner of a violation of Section 401, Title 18, United States Code (Contempt of Court).

Citation to Opinion Below.

The opinion of the Court of Appeals has not yet been reported and is appended hereto as Appendix "A."

Jurisdiction.

The date of the judgment sought to be reviewed, and the time of its entry is June 23, 1969.

The date of ~~the~~ denial of the petition for rehearing and the time of its entry is July 23, 1969.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Title 28, United States Code, Section 1254.

Question Presented for Review.

Whether the District Court for the Central District of California and the Court of Appeals erred in finding there was jurisdiction for a conviction of contempt of court for failure to respond to a subpoena when there was no valid subpoena or other valid court order in existence at the time of the alleged act of contempt.

Statute and Federal Rules of Criminal Procedure Involved.

Title 18, United States Code, Section 401, provides:

"POWER OF COURT

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) Misbehavior of any of its officers in their official transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Rule 17(g) of the Federal Rules of Criminal Procedure provides:

"CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon

him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a commissioner."

Rule 42(b) of the Federal Rules of Criminal Procedure provides:

"DISPOSITION UPON NOTICE AND HEARING. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Statement of the Case.

Your petitioner was sentenced to the custody of the Attorney General or his authorized representative for a period of six months for contempt of court for failure to respond to a subpoena, the performance of which,

had been superseded by three continuances by an agreement between counsel for petitioner and the government that petitioner would be "on call."

Those facts which are material to the consideration of the question presented follow. The citation references are to the Trial Reporter's Transcript "[Rep. Tr.]" and the Clerk's Transcript on Appeal to the United States Court of Appeals for the Ninth Circuit "[Clk. Tr.]."

The only witness whose testimony is relevant to the issue befor this Honorable Court was Bruce I. Hochman, a member of the California Bar, who several months prior to the trial of this case entered into an attorney-client relationship with the appellant herein [Rep. Tr. p. 36]. Mr. Hochman did not know whether he had ever seen the subpoena which was served on Mr. Snyder but did become aware of the fact of said subpoena a day or two after Mr. Snyder had been served during mid-February of 1968 [Rep. Tr. p. 38].

In mid-February, 1968, Mr. Hochman had a conversation with Assistant United States Attorney Nissen regarding a requirement that Mr. Snyder either appear or not appear on February 20, 1968, the date specified in the subpoena. Mr. Nissen in that conversation acceded to Mr. Hochman's request that Mr. Snyder "be on call" [Rep. Tr. p. 41]. Mr. Hochman, as a result of his conversation with Mr. Nissen, informed his client, the appellant herein, that arrangements had been made for him to be "on call" [Rep. Tr. p. 42]. Mr. Hochman explained to Mr. Snyder what the term "on call" meant and what the procedures would be when the appellant was required as a witness [Rep. Tr. p. 43]. The witness further testified that he had previously represented the appellant in similar type situations wherein the appel-

lant had responded upon telephonic or personal notices to appear [Rep. Tr. pp. 44, 45].

On or about March 5, 1968, Mr. Hochman had a conversation with appellant, Mr. Nissen and an F.B.I. agent named Hill [Rep. Tr. p. 47] in Mr. Nissen's office in the building (312 North Spring) [Rep. Tr. p. 48]. The purpose of the meeting was to prepare for appellant's testimony in the forthcoming case of *U.S.A. v. Gebhard,* No. 1331-(A)-CR. It was at Mr. Hochman's request that Mr. Snyder was placed on call through communication with Mr. Hochman and appellant stated that this procedure would be agreeable to him [Rep. Tr. p. 49].

The next communication received by Mr. Hochman regarding appellant's appearance in the *Gebhard* case was a telegram from Mr. Nissen [Rep. Tr. p. 51] which was dated March 14, 1968 and received at his office [Rep. Tr. p. 52]. After receiving the telegram [Govt. Ex. 6] Mr. Hochman had a conversation with appellant [Rep. Tr. p. 53] by telephone and read to appellant the contents of the telegram which are set forth in Reporter's Transcript page 55, as follows:

> "Your subpoena in the case of U.S. vs. Gebhard has been continued for trial to April 9, 1968, at 9:30 A.M. by order of the United States District Court. You must be present at that time unless prior arrangements are made with Assistant U. S. Attorney David R. Nissen".

Mr. Hochman, after reading the wire to appellant, told him that he would make arrangements with Mr. Nissen to have him placed on call [Rep. Tr. pp. 55-56]. Mr. Hochman had a subsequent conversation with Mr.

Nissen wherein it was agreed that the appellant would remain on call for the new date, *i.e.*, the trial commencing on April 9, 1968 [Rep. Tr. p. 61].

After the above described conversation between himself and appellant, Mr. Hochman attempted without success to locate the appellant herein [Rep. Tr. p. 64]. Mr. Hochman tried to locate Mr. Snyder five days before trial through the telephone [Rep. Tr. p. 66] at his apartment and where he played cards, in order to advise him of the April 9, 1968 date [Rep. Tr. p. 68]. He also spoke to several of Mr. Snyder's friends in an effort to locate him [Rep. Tr. p. 69], checked with appellant's accountant [Rep. Tr. p. 72] but all to no avail.

It was Mr. Hochman's understanding that his arrangement with Mr. Nissen was a continuing one from when appellant was first served on February 15, 1968 until his last contact with Mr. Nissen and this communication was passed on to the appellant [Rep. Tr. p. 74]. [This was objected to by appellant's counsel as calling for a conclusion at Rep. Tr. p. 74 but said objection was overruled.]

Upon cross-examination, the following testimony was elicited from Mr. Hochman by defense counsel:

1. Mr. Hochman became aware prior to February 20, 1968 that the *Gebhard* case was going to be continued but he was not in Court when the case actually was continued [Rep. Tr. p. 76].

2. Defense counsel then read a court minute order [Clk. Tr. p. 2] which recited that on February 20, 1968, the *Gebhard* case was continued until March 12, 1968 [Rep. Tr. p. 77].

3. Mr. Hochman was informed by Mr. Nissen prior to February 20, 1968, that appellant would not have to appear on that date and he passed this information on to appellant but he did not recall getting the March 12, 1968 date from Mr. Nissen and passing that on to appellant [Rep. Tr. p. 78]. To Mr. Hochman's best recollection, he told appellant the case was continued and they would be notified when it was reset [Rep. Tr. p. 79].

4. Defense counsel then read from the court minutes of March 6, 1968 [Clk. Tr. p. 3] where the trial was continued to March 21, 1968 [Rep. Tr. p. 79]. Mr. Hochman had no specific recollection of being apprised of the situation described in the March 6, 1968 minute order or telling appellant that the trial had been continued until March 21, 1968 [Rep. Tr. p. 80].

5. Defense counsel then read from a minute order of the court dated March 14, 1968. (NOTE: although the appellant designated as part of the record on appeal all minute orders of the court for the months of February, March, and April 1968 [Clk. Tr. p. 5, Item 2] said minute order of March 14, 1968 does not appear in the record of the Clerk's Transcript which was sent to counsel for the appellant. This Court's attention is respectfully directed to the Clerk's Transcript on Appeal which was forwarded to counsel for Mr. Gebhard at page 93 thereof where the subject minute order may be found. Because said minute order was designated in this case, the appellant herein will incorporate the same in this case as though it were in the Clerk's Transcript.)

Said minute order was read into the record by defense counsel as follows [Rep. Tr. p. 81]:

> "On motion of defendant, court orders trial in this case continued to April 9, 1968 at 9:30 A.M. The court further orders that it will grant no further continuances. Also, the defndant's moion attacking the Grand Jury array were unable to be heard on that date, and it has your initials typed in."

6. Mr. Hochman was not aware of the above described proceedings which took place on March 14, 1968, and could not, therefore, tell appellant about them [Rep. Tr. p. 82].

7. From the period of commencing February 15, 1968 through April 9, 1968, Mr. Hochman received no communication, with the exception of the February 15, 1968 subpoena, from the Court that appellant was supposed to appear on April 9, 1968 or any prior date. In fact, the only written communication received by Mr. Hochman during that period was the telegram from Mr. Nissen [Rep. Tr. p. 83].

The basis for federal jurisdiction in the court of first instance was Title 18, United States Code, Section 3231. It must be understood that the above reference to Section 3231 is not a concession of jurisdiction.

Reasons for Granting the Writ.

The decision of the Court of Appeals is in conflict with applicable decisions of this Honorable Court. The Court of Appeals has misconstrued and misapplied the case of *Blackmer v. United States,* 284 U.S. 421 (1932). In *Blackmer* the subpoenaee never responded

to the subject supoena. In the instant case your petitioner did respond to the subpoena and obtained an agreement that he would be "on call." There is no question but that petitioner did not honor his agreement. But, at that time his appeaance was secured by agreement and not a valid court order. The original subpoena, or valid order, was supplanted and superseded by the agreement. The United States Attorney was not obligated to excuse petitioner's attendance on February 20, 1968, but nevertheless did. The subpoena died at that time. The record is devoid of any other order of the District Court compelling the attendance of petitioner.

The Court of Appeals looked to, and mistakenly found, an "order" when it quoted, in its opinion, the telegram sent to petitioner by the United States Attorney. Said telegram related "Your subpoena . . . has been continued to April 9th, 1968 at 9:30 A.M. by order of the United States District Court. You must be present. . . ." Such is simply not the case. The Court of Appeals stated, "Thus, he was disobeying the court, not the district attorney, when he failed to appear." Thre is absolutely no proof of *any* court order continuing the subpoena even though the Court of Appeals relied on the telegram for proof of said order. The telegram was, therefore, a misstatement.

Petitioner has no quarrel with the proposition, as stated in *Blackmer, supra,* that a subpoena imposes a continuing duty of attendance. "It was the duty of the petitioner to respond to the subpoena and to remain in attendance until excused by the court or by the Goverment's representatives." *Blackmer,* 284 U.S. at 443. In the case at bar the excuse was obtained from

the government's representatives and a promise to appear took the place of the subpoena. Petitioner satisfied his obligation to the subpoena itself when the excuse was obtained. Even though a subpoena imposes a continuing duty, that duty was extinguished.

The opinion of the Court of Appeals overlooks the fact that there were three continuances of the case between February 20, 1968, and the date the trial began. It is inconceivable how the subpoena could survive the continuances. In *Blackmer, supra,* Blackmer was subpoenaed to appear on one date and the case was continued on that date to another date. Blackmer appeared at no time. In the case at bar, petitioner's attendance at the first date was excused by the government and then the case was continued three times without any order of court respecting the subject subpoena. If, as was the case, the initial appearance was excused, then did not the District Court have jurisdiction of the person of the petitioner by reason of its failure to direct his appearance, either personally or indirectly?

In the instant case, the Court of Appeals has sanctioned a departure from the accepted and usual course of judicial decisions by extending judicial jurisdiction to an improper subject. Such a decision calls for an exercise of this Court's power of supervision.

Petitioner was not under any court order, subpoena, writ, or any other mandate when he failed to appear on April 9, 1968, as directed to do in a telegram from the United States Attorney. "A party must have violated an express court order before he can be punished for contempt." *Berry v. Midtown Service Corporation,* 104 F. 2d 107, 110 (2d Cir. 1939), and "no one

shall be punished for disobedience of an order which does not definitely prescribe what he is to do." *National Labor Relations Board v. New York Merchandising Co.,* 134 F. 2d 949, 952 (2d Cir. 1943 opinion by Learned Hand).

The only court order in this case was the subpoena requiring petitioner's appearance on February 20, 1968, from which appearance he was specifically excused by the Government. Can this one order by implication or intendment somehow be expanded to cover petitioner's appearance in April of 1968 after three continuances without his presence, consent, or knowledge, with no further order of the court? This Honorable Court has answered this question in the negative in *Terminal R.R. Ass'n. v. United States,* 266 U.S. 17, 29, wherein this Court stated the following:

> "In contempt proceedings for its enforcement, a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought and the facts must constitute a plain violation of the decree so read."

Conclusion.

If this Honorable Court were to grant the requested writ of certiorari then it could cut short the instant attempt to convict a man for contempt of court by violating a court order when there was no such court order in existence.

It is respectfully submitted that the prayed for writ should be granted.

Dated: Beverly Hills, California on August 20, 1969.

RICHARD G. SHERMAN,
SHERMAN AND STURMAN,
Attorneys for Petitioner.

APPENDIX "A".

The Opinion of the United States Court of Appeals for the Ninth Circuit is set out below:

United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Albert Snyder, Defendant-Appellant. No. 23,049.

[June 23, 1969]

Appeal from the United States District Court for the Central District of California.

Before: BARNES and DUNIWAY, Circuit Judges, and McNICHOLS, District Judge.*

BARNES, Circuit Judge:

This is an appeal from a judgment finding appellant guilty of contempt of court for failing to comply with a subpoena issued by the District Court, Central District of California.

The facts are simple, Appellant was served with a subpoena (Ex. 2) on February 15, 1968, calling for his appearance on February 20, 1968. Appellant's attorney requested the United States Attorney that appellant be allowed to remain "on call." Appellant and his attorney had made such arrangements previously and had respected their obligations. Appellant had told his attorney such a "continuing arrangement" was agreeable to him. He was not called on February 20, 1968, nor at any time before March 14, 1968. On that date, the Assistant United States Attorney sent appellant's counsel

*Hon. Ray McNichols, United States District Judge, Boise, Idaho, sitting by designation.

a telegram (Ex. 5, p. 2) requesting appellant's appearance in court on April 9, 1968. This telegram was read to appellant. Thereafter, appellant wilfully absented himself from the State of California and failed to appear on April 9, 1968, or any other date to which the case on trial was continued.

Appellant, upon his return to California, was served with an order to show cause why he was not guilty of contempt of court, and was found guilty after a hearing.

The leading case on the subject is *Blackmer v. United States,* 284 U.S. 421 (1932). There the defense was that the defendant had been subpoenaed for April 2, 1928, but the case was continued for trial to April 9, 1928, and he could not be punished for contempt because his only duty was to appear on April 2, 1928. The Court in Blackmer held:

> "It was the duty of the petitioner to respond to the subpoena and to remain in attendance until excused by the court or by the Government's representatives." *Id.* at 443.

This was the law when *Blackmer* was decided. It was also an interpretation of former 28 U.S.C. §655, which enactment required a person served to attend "and not to depart the court without leave thereof, or of the district attorney. . . ."

This statute was superseded with the adoption of Federal Rule of Criminal Procedure 17 (effective 1948, which did not incorporate the phrase quoted above. (Federal Rule of Civil Procedure 45—effective 1938—likewise dropped the language.)

Is the duty to respond to the subpoena a "continuing duty," despite the omission of the §655 language in the statute authorizing the subpoena? We hold it is, and was.

Rule 17 (Title 18) provides in subdivision (g):

> "*Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued. . . ."

There is here no excuse. For his own convenience and/or the convenience of his attorney, appellant not only agreed to stand in readiness; he asked his attorney to arrange for it. His failure to respect the subpoena was knowing, deliberate, planned and wilful. No excuse adequate or otherwise is here offered on his behalf. He broke his agreement, arranged at his request and for his convenience, and now suggests that technically he did not do it, for he was not told personally by the court to return on April 9, 1968. The wire to his attorney told him that *by court order* his subpoena had been continued to April 9, 1968. ("Your subpoena . . . has been continued to April 9th, 1968 at 9:30 A.M. by order of the United States District Court. You must be present. . . .") Thus, he was disobeying the court, not the district attorney, when he failed to appear.

There are several reasons for our holding that the subpoena creates a continuing obligation until the person subpoenaed has been released from it.

First, there never has been any indication in Congress or in any Advisory Committee notes brought to our attention of any intent to limit the efficacy of the subpoena by the failure to include the 28 U.S.C. § 655

language in the new statute. *Cf. In re Germann,* 262 F.Supp. 707, 710 (S.D.N.Y. 1966), *aff'd,* 370 F.2d 1019 (2d Cir. 1967), vacated because of petitioner's death, 389 U.S. 329. Notes, Fed. R. Civ. P. 45. 5 Moore, Federal Practice, ¶45.03[2] n.5 (1968 ed.).

Second, this was a violation of an order of court, not of a United States Attorney, just as a subpoena issued in blank at the request of a United States Attorney is an order of the court, not of the United States Attorney. *Cf. Taylor v. United States,* 221 F.2d 809 (6th Cir. 1955).

Third, as the appellee's brief states (page 14):

> "To deny the parties involved in litigation the authority to arrange for compliance with a subpoena at a time mutually convenient for all concerned would place an intolerable burden not only upon the District Courts, but upon those subpoenaed to appear as witnesses."

Fourth, the person subpoenaed is protected, should any emergency arise, from any abuse of process, or even from legitimate inconvenience to himself, by his right to move to quash.

Fifth, the Supreme Court has recognized the necessity and validity of the legal theory underlying the holding in *Blackmer, supra,* and its practical importance to the administration of justice. *United States v. Bryan,* 339 U.S. 323 (1950).

We AFFIRM.

APPENDIX "B".

Order and Judgment Holding Albert B. Snyder in Contempt.

The Order and Judgment Holding Albert B. Snyder in Contempt of the United States District Court is set out below:

United States District Court, Central District of California.

United States of America, Plaintiff, v. Edwin Nathaniel Gebhard, Defendant. No. 1331-A-(AH)-Crim.

Filed June 7, 1968.

On this 17th day of May, 1968, came the attorney for the plaintiff, United States of America, and the defendant appeared in person and by counsel, Richard G. Sherman. The defendant personally and by his counsel and the plaintiff by its counsel, and each of them, did not request special findings and each of them did in open court expressly waive such special findings. The Court hereby finds that:

(1) On February 15, 1968, a subpoena was served upon Albert B. Snyder requiring his appearance at the trial of *United States v. Edwin Nathaniel Gebhard,* on February 20, 1968;

(2) Upon continuance of the case of *United States v. Gebhard,* Albert B. Snyder was notified that his appearance would be required on April 9, 1968, at 9:30 A.M.;

(3) The notification of Albert B. Snyder of the continuance was pursuant to an agreement consented to by himself and his attorney.

(4) Albert B. Snyder failed to appear in Court on April 9, 1968, or at any time before trial herein concluded;

(5) Albert B. Snyder fled the jurisdiction of this Court and deliberately concealed his whereabouts to avoid compliance with the subpoena;

(6) Upon motion of the plaintiff, United States of America, the Court on May 10, 1968, made and entered the following Order to Show Cause:

> "IT IS HEREBY ORDERED that Albert B. Snyder appear before this Court and show cause as to why he should not be held in civil or criminal contempt for failure to appear before this Court pursuant to subpoena and Court Order on February 20, 1968, and April 9, 1968.
>
> "IT IS FURTHER ORDERED that hearing on this Order to show cause shall be held on Thursday, May 16, 1968, at 9:30 A.M., before this Court, and Albert B. Snyder is hereby ordered to be present with his counsel at that time."

Said Order was served personally upon said Albert B. Snyder at the United States District Court for the District of New Jersey at Camden, New Jersey, on May 14, 1968.

(7) Upon the hearing date of Thursday, May 16, 1968, at 9:30 A.M., said Albert B. Snyder, and his counsel, Richard G. Sherman, and each of them, appeared in Court with Counsel for the plaintiff, United States of America. Said Albert B. Snyder was advised by the Court of his constitutional rights, and arraigned upon the aforesaid Order to Show Cause why he should not be held in criminal contempt for said failure to ap-

pear before this Court pursuant to subpoena and Court Order on February 20, 1968, and April 9, 1968, and thereupon said Albert B. Snyder entered his plea of not guilty. Thereupon, and at the request of said Albert B. Snyder and his said counsel, Richard G. Sherman and each of them, the hearing was continued until the following day, Friday, May 17, 1968;

(8) On Friday, May 17, 1968, the Court held a non-jury trial of said Albert B. Snyder upon his plea of not guilty;

(9) After evidence was presented, points and authorities were submitted on behalf of both parties, and after full argument, the Court did find Albert B. Snyder guilty of criminal contempt;

(10) Thereupon, the Court inquired of Albert B. Snyder and his counsel, Richard G. Sherman, whether they or either of them had anything to say on behalf of Albert B. Snyder or any information to present in mitigation of punishment. Albert B. Snyder answered that he had nothing to say and refused to say anything on his own behalf or present anything in mitigation of punishment. Richard G. Sherman, counsel for Albert B. Snyder, did make a statement on behalf of Albert B. Snyder and in mitigation of his punishment.

(11) NOW THEREFORE, after full hearing and consideration of all the evidence, the arguments, and points and authorities, and all the files and records herein and after the aforesaid finding of conviction of criminal contempt of Albert B. Snyder by the Court,

IT IS THEREFORE ORDERED AND ADJUDGED that the defendant Albert B. Snyder has been convicted upon his plea of not guilty of the

offense of contempt of Court in violation of Section 401 of Title 18, United States Code and Rules 17(g) and 42(b) of the Federal Rules of Criminal Procedure, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS FURTHER ORDERED AND ADJUDGED that the defendant is guilty as charged and convicted;

IT IS FURTHER ORDERED AND ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six months;

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ A. ANDREW HAUK
United States District Judge

The Court recommends commitment to the Federal Correctional Institution at Terminal Island, California.

/s/ Edward Maldonado
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 493

ALBERT SNYDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1969. A petition for rehearing was denied on July 23, 1969. The petition for a writ of certiorari was filed on August 22, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, subpoenaed for a day certain as a witness in a criminal trial but allowed to remain on call, was properly held in criminal contempt for

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having willfully absented himself after being informed of the date to which the case had been continued.

RULE INVOLVED

Rule 17(g), F.R. Crim. P., provides:

> Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a commissioner.

STATEMENT

Following a court trial under Rule 42(b), F.R. Cr. P., in the United States District Court for the Central District of California, petitioner was convicted of contempt of court, 18 U.S.C. 401 (see Pet. 2–3), and was sentenced to imprisonment for a period of six months (2 R. 7, 33, 150). The court of appeals affirmed (Pet. App. A).

On February 15, 1968, petitioner was served with a subpoena to appear as a witness in the trial of *United States* v. *Gebhard*, set for trial in the above-named court on February 20, 1968 (2 R. 30). Shortly thereafter, petitioner and his attorney, Bruce I. Hochman, met in the United States Attorney's office with the Assistant United States Attorney in charge of the case. In view of the anticipated length of the trial and for the convenience of petitioner, Hochman requested that petitioner be excused from appearing on February 20 and suggested instead that he be "on call" for such time as his testimony would be required.

The assistant agreed (2 R. 37, 41–43, 50).[1] At the request of defense counsel, the case was thereafter continued on three occasions. Hochman discussed the continuances with petitioner (2 R. 79–81), and on March 5, petitioner and Hochman also discussed with government counsel petitioner's testimony and the arrangements for calling him (2 R. 45, 48–51).

On March 14, 1968, the Assistant United States Attorney sent petitioner a telegram, in care of Hochman, telling him that the case had been re-set for April 9, 1968, and advising petitioner that he must be present on that date unless prior arrangements were made with the office of the United States Attorney. Hochman read the telegram to petitioner, then called the assistant and agreed that petitioner should continue to be on call for the trial commencing on April 9 (2 R. 51–56, 61).

About April 4, Hochman tried to reach petitioner by telephone and was told that petitioner's telephone had been disconnected. His further efforts to reach petitioner were unsuccessful (2 R. 64–73). A material witness warrant was issued for petitioner on April 5. On April 18, petitioner was called as a witness in the trial and failed to appear. The trial court issued a bench warrant for his arrest (2 R. 31), and petitioner was arrested in New Jersey on May 8, after the trial was over. Investigation showed that during the trial he had been in El Paso, Chicago and Philadelphia, under assumed names (2 R. 88–91).

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[1] Petitioner was familiar with such arrangements, which had been made for him before the grand jury in this same matter (2 R. 44, 46).

ARGUMENT

Petitioner seeks review on the ground that the decision of the court of appeals is in conflict with the decision of this Court in *Blackmer* v. *United States*, 284 U.S. 421, upon which the court of appeals relied, but which petitioner claims it misconstrued. In *Blackmer*, this Court held that a person subpoenaed as a witness to appear on April 2 was not excused merely because the trial did not begin until April 9. It is true, as the court of appeals here pointed out (Pet. App. A–2), that the subpoena in *Blackmer* specified in accordance with the language of the then existing predecessor statute to Rule 17, F.R. Cr. P., that the witness was "not to depart the court without leave thereof, or of the district attorney." Although the quoted language was not carried over into Rule 17, the Notes of the Advisory Committee on Rules indicate no intention to change existing law. 18 U.S.C.A. Rule 17, Federal Rules of Criminal Procedure; *In re Germann*, 262 F. Supp. 707, 709–710 (D.C. S.D.N.Y.), affirmed, *United States* v. *Germann*, 370 F. 2d 1019, 1022 (C.A. 2), vacated for reconsideration in light of original petitioner's death, *Germann* v. *United States*, 389 U.S. 329; *Taylor* v. *United States*, 221 F. 2d 809 (C.A. 6), certiorari denied, 350 U.S. 834; cf. *Kenyon* v. *Automatic Instrument Co.*, 10 F.R.D. 248 (D.C. W.D. Mich.), affirmed, 186 F. 2d 752 (C.A. 6), certiorari denied, 342 U.S. 820.

Petitioner, however, does not rely solely on the deletion from Rule 17 of the language quoted above. Rather he claims that the instant case is distinguishable from *Blackmer* on its facts. In *Blackmer*, he

urges, the prospective witness never responded to the subpoena, whereas here he did respond and obtained an agreement that he would remain on call. According to petitioner, the agreement to remain on call supplanted and superseded the subpoena and altogether excused petitioner from attending the trial. (Pet. 8–10).

In fact, the agreement that petitioner should remain on call did not by any means eliminate the continued duty to attend court, which duty petitioner concedes to have resulted from the subpoena. To the extent that the agreement between petitioner and the Assistant United States Attorney modified the subpoena at all, it merely excused petitioner's appearance until notified by government counsel. Implicit in the agreement to remain "on call," by definition, was petitioner's assurance that he would be available to appear when notified, and that he would not make it impossible to receive notification by absconding from the jurisdiction and avoiding communication not only with the court and with the United States Attorney, but also with his own counsel. By willfully violating his agreement with the assistant who allowed petitioner to remain on call until his testimony was required, petitioner cannot be held to have succeeded in avoiding the force of a valid subpoena. As this Court has noted before, a subpoena is not a game of "hare and hounds," in which the witness must testify only if cornered at the end of the chase. *United States* v. *Bryan*, 339 U.S. 323, 331.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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